Supreme Court, U.S.
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No. 98-859

In The

Supreme Court of the United States

October Term, 1998

THE BOEING COMPANY,

Petitioner,

v.

KENNETH W. ALDRICH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Respondent's Brief in Opposition offers four arguments why this court should not grant certiorari. He says that (1) the court of appeals' judicial estoppel analysis was correct; (2) the circuit conflict identified by petitioner does not really exist; (3) this case is distinguishable from *Cleveland v. Policy Management Systems Corp.*; and (4) the court of appeals' reasonable accommodation holding provides an independent "alternative ground" for affirming the court of appeals' decision.

In this reply Boeing will show that (1) respondent's fact-based defense of the court of appeals' judicial estoppel holding begs the question of whether the court of appeals applied the proper legal standard; (2) the intercircuit conflict over the proper treatment of judicial estoppel in ADA cases is real; (3) *Cleveland* is indeed distinguishable from the present case, but in petitioner's favor, rather than respondent's; and (4) respondent's reasonable accommodation claims are not independent of the judicial estoppel issues on which Boeing seeks certiorari, but were reached by the court of appeals only because it had first rejected Boeing's judicial estoppel defense.

1. Plaintiff's Analysis of the Court of Appeals' Judicial Estoppel Decision Begs the Key Question of Whether the Court of Appeals Applied the Correct Legal Standards

The key basis for the court of appeals' judicial estoppel decision in respondent's favor was its adherence to

prior Tenth Circuit case law broadly rejecting application of judicial estoppel in ***any*** situation. *See* App. 5-6. Boeing's arguments in its petition are that the Tenth Circuit's blanket rejection of judicial estoppel in all cases is erroneous, and that under ***any*** of the other approaches to judicial estoppel taken in federal and state appellate courts respondent would have been estopped from claiming entitlement to alleged "reasonable accommodations."

The ***factual*** basis of Boeing's judicial estoppel arguments includes plaintiffs' sworn testimony in his workers' compensation case against Boeing that he could not do his Boeing job even with reasonable accommodation, his application for private disability benefits available only if his injuries had left him forever unable to engage in gainful employment, and his consequent receipt of $50,000 of workers compensation and private disability benefits. *See* Petition for a Writ of Certiorari at 12-18. These facts are uncontroverted: neither before the court of appeals nor in his Brief in Opposition does respondent contest them. Respondent's defense of the Tenth Circuit's judicial estoppel holding is entirely conclusory, *see* Brief in Opposition at 6-9, asserts without attempted justification that the court of appeals correctly determined that private disability benefits and Kansas workers compensation benefits are awarded "without regard to reasonable accommodation," (*see id.* at 7), and raises various additional factual allegations not relied on by the court of appeals (*see id.* at 7-8).

Respondent's defense of the court of appeals' judicial estoppel holdings thus entirely begs the critical, purely ***legal*** question of which of the contending approaches to

judicial estoppel should be applied. As Boeing has demonstrated, the court of appeals' assertion that Kansas workers' compensation benefits are awarded without regard to reasonable accommodation is dead wrong as a matter of Kansas law. *See* Petition for a Writ of Certiorari at 17-18 (citing *Griffin v. Dodge City Co-operative Exchange*, 23 Kan. App. 2d 139, 140 Syl. ¶¶ 1-2, 147, 151 (1996)). The court of appeals' similarly conclusory assertion about private disability benefits, *see* App. 5-6, is likewise belied by the language of the applicable disability plan documents.

Notwithstanding Boeing's arguments, which were accepted by the district court, *see* App. 35-36, respondent has made no attempt, beyond mere contrary assertion, to rebut them in its Brief in Opposition. Respondent does not attempt to show, for example, that the court of appeals correctly interpreted Kansas workers' compensation law, or that the court of appeals' equation of social security disability benefits and private disability benefits offered by an employer was appropriate. Indeed, like the court of appeals, respondent cites no authority whatsoever to support its contentions on these points.

Respondent also tries to support the court of appeals' decision by falsely implying that he didn't actually ***say*** that he "could not perform the essential functions of [his] job, with or without reasonable accommodation," but merely acquiesced in Boeing's erroneous understanding to that effect. *See* Brief in Opposition at 8. Even if respondent had ***not*** explicitly affirmed that he could not do his sheet metal assembler's job even with reasonable accommodation (and it is uncontroverted that he ***did***, under oath, *see* Petition for a Writ of Certiorari at 5-6), his (and

his workers compensation counsel's) silence in the face of Boeing's voiced contrary understanding of his position would justify application of judicial estoppel. *See, e.g.*, W. Keeton, *Prosser and Keeton on the Law of Torts*, § 105, at 734 (5th Ed. 1984) (when one party to a transaction knows that the other party is about to act under a mistaken belief, "the law of estoppel creates a duty to speak, under penalty of loss of the right to assert the truth at a later time.").

Finally, respondent invokes the familiar point that material factual disputes must be resolved in his favor, and are beyond the purview of this Court. *See id.* at 8-9 (citing Fed. R. Civ. Proc. 56(c) and *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495 (1969)). Respondent does not identify ***any*** disputed facts on which Boeing has relied, and could not do so, because there are none. Boeing's arguments in its Petition for a Writ of Certiorari are ***not*** premised on suggestions that the court of appeals got the ***facts*** wrong; they are premised on suggestions that the court of appeals made ***legal*** errors in its determination of the proper scope of judicial estoppel. Certiorari review of legal errors is entirely proper.

2. There is Indeed a Case Law Conflict With Respect to the Proper Application of Judicial Estoppel in Cases Similar to This One

Respondent's second argument (*See* Brief in Opposition at 9-12) is that there is not a conflict in the cases, such as this one, in which employers have argued that application for various forms of disability benefits should estop employees from making ADA claims inconsistent

with receipt of those benefits. Respondent bases his "no conflict" argument on the conclusory assertion that Boeing has "mischaracterized" *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324 (10th Cir. 1998) as an outlier, and argues that *Rascon* is no different than other appellate decisions holding that mere application for Social Security Disability Benefits is not in itself an automatic bar to ADA discrimination claims. *See* Brief in Opposition at 11.

Respondent's "no conflict" argument ignores the clear circuit conflicts in ADA judicial estoppel theories that obviously prompted this Court to grant certiorari in *Cleveland v. Policy Management Systems*, 119 S.Ct. 39 (1998) (order granting certiorari). Multiple cases have recognized that the courts of appeals are divided as to the proper application of judicial estoppel in ADA cases when plaintiffs have sought disability benefits arguably inconsistent with their ADA claims. *See, e.g, Rascon*, 143 F.3d at 1324, 1330-32 (10th Cir. 1998); *Dush v. Appleton Electric Co.*, 124 F.3d 957, 961-62 (8th Cir. 1997) (discussing intra-circuit and inter-circuit splits of authority and citing cases).

Respondent's "no conflict" argument also knocks down a straw man. Boeing is not arguing that the court of appeals should have adopted in this case a per se rule holding that application for Social Security disability benefits or workers compensation benefits or private disability benefits should automatically bar any subsequent ADA discrimination claim by the benefit-receiving employee, as decided in *McNemar v. Disney Store, Inc.*, 91 F.3d 610, 616-21 (3d Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997). Boeing is arguing, rather, that under ***any*** judicial estoppel approach ***except*** the Tenth Circuit's blanket

rejection of judicial estoppel – including the moderate, relatively pro-plaintiff approaches of *Talavara v. School Board of Palm Beach County*, 129 F.3d 1214, 1220 (11th Cir. 1997) and *Swanks v. Washington Metropolitan Area Transit Authority*, 116 F.3d 582, 587 (D.C. Cir. 1997) – judicial estoppel would be applied in the present case to prevent respondent from contradicting his own assertions. *See* Petition for a Writ of Certiorari at 14-15. Respondent has made no attempt to refute Boeing's actual argument.

3. *Cleveland* is Not Distinguishable on Grounds Favoring Respondent

Respondent's third argument is that *Cleveland v. Policy Management Systems Corp.*, 120 F.3d 513 (5th Cir. 1997), *cert. granted*, 119 S.Ct. 39 (1998), is distinguishable from the present case.[1] Respondent notes, accurately, that in *Cleveland* the ADA plaintiff had also sought social security disability benefits, whereas in the present case, besides pursuing his ADA claim, respondent obtained workers compensation benefits and private disability benefits, rather than social security benefits.[2]

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[1] Respondent also asserts that consideration of the present case would not assist this Court in deciding *Cleveland*. *See* Brief in Opposition at 12-13. This assertion is probably correct, but, once again, respondent knocks down a straw man. Boeing has not suggested that this Court's consideration of *Cleveland* might profitably be deferred until it decided this case. Boeing has suggested, rather, that this court might wish to defer consideration of the present case until it had decided *Cleveland*. *See* Petition for a Writ of Certiorari at 18-20.

[2] Respondent says that in the Tenth Circuit the judicial estoppel effect, if any, of social security claims upon subsequent

The distinction urged by respondent, however, *favors* the application of judicial estoppel in the present case. An employer cannot be subjected to liability in social security proceedings, may not even know that those proceedings are ongoing, and will seldom know what position an employee is taking in those proceedings. Accordingly, an employer cannot be whipsawed if the employee takes different positions in an ADA lawsuit than he does in social security proceedings, and an employer will seldom, if ever, rely on the position the employee takes before the Social Security Administration. In cases such as *Cleveland*, therefore, the key policy justification for precluding the employee from taking inconsistent positions in successive proceedings is the unseemliness of allowing a party to play "fast and loose" with the two courts or administrative agencies involved; unfairness to another party is not at issue. *See, e.g., Scarano v. Central R.R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953).

When a plaintiff attempts to obtain successive recoveries, based on diametrically opposed theories, from the same adversary, however, additional policy justifications come into play, based on the adversary's reliance and potential double liability. *See, e.g., Colonial Refrigerated Tranportation, Inc. v. Mitchell*, 403 F.2d 541, 550 (5th Cir. 1968); *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir.

ADA claims is an open question. *See* Brief in Opposition at 12-13 (citing *Smith v. Midland Brake, Inc.*, 138 F.3d 1304 (10th Cir. 1998), *rehearing en banc granted on other grounds*, 158 F.3d 1060 (10th Cir. 1998)). This assertion is clearly wrong: by the time the court of appeals decided this case, the issue left open in *Midland Brake* was no longer open: it had been decided in *Rascon*. *See Rascon*, 143 F.3d 1324; App. 5-7.

1980). The present case fits that pattern: respondent enhanced the value of his workers' compensation case by swearing that even reasonable accommodation would not allow him to do his job and then, with Boeing's money in hand, took exactly the opposite position in this lawsuit to maximize the value of his ADA claim. In such a situation, precluding an ADA plaintiff from taking inconsistent positions is merely a variation of the traditional doctrine of equitable estoppel, and the key policy goal is avoiding unfairness to the opposing party. *See, e.g.*, 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4477, at 779-80 (1981).

4. The Court of Appeals' Reasonable Accommodation Holdings Do Not Provide Independent Grounds for Affirming its Judgment

Respondent's final argument is that an "alternate ground" for the court of appeals' reversal of the district court's summary judgment in Boeing's favor is provided by the court of appeals' rulings that there were material factual disputes as to whether Boeing might have provided respondent various forms of reasonable accommodation, such as by providing him "work modifications and/or ergonomic training . . . that would have permitted [him] to return to his original job as an assembly worker," Brief in Opposition at 16 (citing App. 13-14), or by transferring him to a different job. This argument has factual flaws,[3] but is more fundamentally (and fatally) flawed

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[3] For example, respondent's position that he was entitled under the collective bargaining agreement to be transferred to

because the court of appeals was able to reach respondent's various reasonable accommodation contentions only by rejecting Boeing's argument (and the district court's holding) that respondent was judicially estopped from claiming entitlement to reasonable accommodation.

Thus should this Court rule that the court of appeals legally erred by reversing the district court's acceptance of Boeing's judicial estoppel argument, or should the court of appeals reach a similar conclusion upon remand in light of this Court's forthcoming *Cleveland* decision, respondent's factual contentions about reasonable accommodation would never be reached. Those factual contentions do not provide an independent, alternative ground for the court of appeals' decision.

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certain ostensibly "vacant" positions as a reasonable accommodation, and could trump the express "Category A" contractual rights of junior employees, Brief in Opposition at 2-3, has been rejected in an unbroken string of arbitrations between Boeing and respondent's Union, and the Union has long ago abandoned the interpretation of the collective bargaining agreement upon which respondent now relies. Respondent also words his descriptions of the court of appeals' "reasonable accommodation" analysis so as to imply that the court of appeals had ruled him entitled to reasonable accommodation; in actuality, the court of appeals only held that plaintiff had established a "genuine issue of material fact" as to whether Boeing might reasonably have accommodated him, *see* App. 13, and indeed ruled as a matter of law that of the 25 ostensibly vacant jobs to which respondent claimed he was entitled to be transferred, 23 did not constitute ADA-mandated "reasonable accommodation." *See* App. 13-15 & n. 5.

CONCLUSION

In its petition, Boeing asked this Court to grant certiorari now in the present case, or defer consideration of the petition pending this Court's forthcoming decision in *Cleveland*, which might well justify a summary decision vacating the court of appeals' decision and remanding for further consideration. Nothing in the Brief in Opposition demonstrates that either of Boeing's alternative requests is not well-taken.

Respectfully submitted,

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